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In the Supreme Court of the United States

OCTOBER TERM, 1980

JOHN SANTOSKY II and ANNIE SANTOSKY,
Petitioners,

v.

BERNHARDT S. KRAMER, Commissioner,
ULSTER COUNTY DEPARTMENT OF
SOCIAL SERVICES,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

Brief of the State of Oregon, Amicus Curiae

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INTEREST OF AMICUS CURIAE

The State of Oregon has termination procedures which are similar in many respects to the procedures New York has enacted. More particularly, Oregon, like New York, allows termination of parental authority when the operative facts are proven by a "preponderance of competent evidence." It is this burden of persuasion that is attacked by petitioners in this case. A similar challenge to the burden of persuasion under the Oregon statutes is now pending before this Court. *Maffey v. State ex rel Juv. Dept. of Klamath Co., No. 80-5227.* Petitioners argue that a "clear and convincing" standard of proof is required by virtue of the Due

Process Clause of the Fourteenth Amendment. Oregon has police power and *parens patriae* interests in the protection of its children. The position taken by petitioners, if accepted, would unbalance the procedural scale heavily in favor of the parents and against the interests of the children.

SUMMARY OF ARGUMENT

On the basis of the Due Process Clause, petitioners seek to impose a "clear and convincing" standard of proof in termination of parental authority cases. It is argued that the standard is required because otherwise a "fundamental" Fourteenth Amendment interest in family integrity would be severed without a sufficient guarantee of the accuracy of that severance.

There are sound reasons for the view that the Due Process Clause of the Fourteenth Amendment was originally conceived to prevent states from arbitrarily restraining the physical freedoms of its citizens. While this original conception of the 'liberty' term has not limited the range of its application by this Court, some trace has survived in the general understanding that "[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Greenholtz v. Nebraska*, 441 U.S. 1, 18 (1979) (Powell, J., concurring in part and dissenting in part). It is also reflected in the fact that certain kinds of particularly

stringent procedures have been reserved for cases in which the loss of personal liberty may be a consequence.

A higher standard of proof and a right to counsel are two procedural requirements that have never been constitutionally mandated by this Court in cases which do not threaten loss of physical freedom. Recently, the Court noted that the right to counsel had never been extended to include prosecutions which did not result in the loss of personal liberty. *Lassiter v. Department of Social Services,* — U.S. ——, 68 L. Ed.2d. 640 (1981). The Court nonetheless indicated that the appointed counsel may sometimes be required in termination cases, although there was a presumption against it.

There are important differences between the right to counsel and the right to a clear and convincing burden of persuasion which have a decisive impact on this case. The appointment of counsel promotes fairness and accuracy in nearly all cases. The imposition of a more stringent burden of proof does exactly the opposite, for it weights the factfinding scales in favor of one party to the detriment of the other. In termination cases, a stricter burden of proof means that it is less likely that there will be inaccurate terminations but more likely that there will be inaccurate failures to terminate. If the parents and the state were the only

parties involved in termination cases, such a result might be an acceptable consequence. But it is the children whose relationship with parents is terminated who are most dramatically affected by the process; and it is children who are harmed by an inaccurate failure to terminate. A failure to terminate parental authority does not necessarily return the child to the natural parents. A failure to terminate simply means that the child is left in the position he was in prior to the attempt to terminate. The child is left in foster care or in an institution and must look forward to a continuing process of shuttling from foster home to foster home or from institution to institution. The failure to terminate necessarily means that the child is denied the possibility of adoption. Even if the state, recognizing the futility of proving permanent neglect by clear and convincing evidence, were to throw up its hands and send the child back to the natural family, there is a distinct danger that the child would be further abused or further neglected. The burden of persuasion petitioners seek to impose as a constitutional requirement increases substantially the likelihood of erroneous failures to terminate, with all its consequences. Since the interests of the children are damaged at least as much by an erroneous failure to terminate as are the interests of the parents by an erroneous termination, the imposition of the increased

burden is unacceptable in almost any fair social calculus.

Principles of federalism should also weigh heavily against requiring a heightened burden of persuasion as a matter of constitutional law. Because the full range of procedures leading up to termination of parental authority in any given New York case are complex and entwine removal proceedings, efforts at rehabilitation, procedural safeguards like right to counsel and *de novo* appellate review which are not mandated by the Due Process Clause, as well as relatively closely drawn standards, the presumption of constitutionality which is a major postulate of constitutional adjudication should be granted full force. Further, there is a tradition of deference to state legislative enactments in the family law area.

The dictum of *Addington v. Texas,* 441 U.S. 418, 431 (1979) that, "The essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold," rightly implies that it is the states, not the courts, that should function as laboratories for social experiment. See, *New State Ice Co. v. Liebman,* 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Mandating a clear and convincing standard of persuasion would be more a matter of secreting substantive law in

the interstices of procedure than imposing procedural safeguards; and it would impose an unnecessary rigidity on a process that must remain sensitive to a bewildering array of interests. The assumption that states are insensitive to the protection of parental interests in termination proceedings is the unspoken predicate of petitioners' case for the clear and convincing standard. An analysis of the procedures and safeguards built into the New York termination scheme thoroughly rebuts that assumption and this Court should not indulge it.

ARGUMENT

The sole issue in this case is framed in the abstract. Petitioners contend that §622 of the New York Family Court Act (F.C.A.) is unconstitutional under the Due Process Clause of the Fourteenth Amendment because it permits a finding of the requisite facts to permanently terminate the parent's or other custodian's custody, F.C.A §614(1), by a "fair preponderance of the evidence." Petitioners have not claimed, or have apparently not claimed, that the preponderance standard violates the Due Process Clause because, viewed in light of the entire New York termination procedure, the standard is unfair or does not provide that process which is due. They have not asserted that any other aspect of the New York procedure; the preponderance

standard for removal,[1] for instance, or the substantive standards for termination, F.C.A § 614, violates due process or is otherwise unconstitutional. And they have not argued that the standard of proof prescribed by the New York statute is unconstitutional as applied. The contention is that the preponderance standard of proof for termination, examined in isolation and in all cases, is invalid because the Fourteenth Amendment demands a more stringent standard, proof by clear and convincing evidence. If the claim is upheld, at least six statutory standards for proof of termina-

[1] The distinction and interrelation between the removal proceeding, often call a dependency proceeding, and the termination proceeding is critical to an assessment of the claim in this case. See, Comment, Dependency Proceedings: What Standard of Proof? An Argument Against the Standard of "Clear and Convincing," 14 San Diego L. Rev. 1155 (1977). A removal proceeding, which may lead to the placement of the child in an institution or foster care after a finding of abuse or neglect, may not, in New York, have the consequence of terminating parental rights. F.C.A. §§1052, 1055. A permanent termination proceeding is to terminate the relations between a parent and "a person . . . who is in the care of an authorized agency, either in an institution or in a foster home." F.C.A §611. The disposition at a termination proceeding, therefore, determines the relationship between the parents and children who have already been removed from the home and placed in an institution or in foster care. Termination may not occur less than one year following removal. F.C.A. §614(1)(d). A child may also be placed voluntarily in an institution or in foster care. For a fairly recent description of procedures, *see Smith v. Organization of Foster Families*, 431 U.S. 816 (1977). It is of importance to this case that it be made clear that a failure to terminate does not lead to the placement of the child in parental custody unless the court rules favorably on a motion to reconsider the underlying order of placement, F.C.A. §632(b), and it is very unlikely that such a motion would receive a favorable treatment when the state has brought a case alleging permanent neglect. An order of termination, of course, anticipates adoption.

As Michael Wald points out, a termination following an initial finding of neglect is rare even in those states which, by statute, allow it. Wald, State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights, 28 Stan. L.Rev. 623, 634 (1976). New York has codified the right of parents to rehabilitate the family.

tion will fall, regardless of the procedural schemes in which they are embedded.[2]

The Due Process Clause of the Fourteenth Amendment commands that, 'No State shall . . . deprive any person of life, liberty, or property, without due process of law." As this Court observed in *Lassiter v. Department of Social Services, supra,* its decisions have "by now made plain beyond the need for multiple citation that a parent's desire for the right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful contervailing interest, protection.' *Stanley v. Illinois,* 405 U.S. 645, 651 (1972)." *Id.,* 68 L. Ed.2d., at 649-50. Those protections have been both procedural and substantive. *Smith v. Organization of Foster Families, supra,* 431 U.S. at 842. The view that the Due Process Clause imposes substantive limits on the capacity of legislatures to enact valid legislation has drawn substantial criticism, especially in that area Professor Ely has called "the sex-children cluster." *See,* J. Ely, Democracy and Distrust: A Theory of Judicial Review (1980); Ely, The Wages of Crying Wolf: A Comment on *Roe v.*

[2] Ariz. Rev. Stat. Ann. § 8-537B (1974); Colo. Rev. Stat. §19-3-106(6)(a) (1978); Idaho Code §16-2009 (1979); Ky. Rev. Stat. §199.603(1) (Supp. 1978); N.Y. Family Ct. Act §622 (McKinney 1975); Ore. Rev. Stat. §419.525(2) (1979). The preponderance standard had been judicially imposed in other states. *See, e.g., In re Fritz,* 460 Pa. 265, 333 A.2d. 466 (1975); *In re Winger,* 558 P.2d. 1311 (Utah 1976).

Wade, 82 Yale L. J. 920 (1973); Linde, Due Process of Lawmaking, 55 Neb. L. Rev. 197 (1976). According family interests procedural protections has not elicited comparable comment, for the obvious reason that procedure is the subject of the language of the Due Process Clause. But it is not at all obvious that family interests invoke the "liberty" term of that Clause, at least as it was originally understood. *See, e.g.*, Shattuck, The True Meaning of the Term 'Liberty' in Those Clauses in the Federal and State Constitutions Which Protect 'Life, Liberty and Property,' 4 Harv. L. Rev. 365 (1891); Warren, The New 'Liberty' Under the Fourteenth Amendment, 39 Harv. L. Rev. 431 (1926); R. Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment (1977); J. Ely, Democracy and Distrust: A Theory of Judicial Review 192 n. 28 (1980).

The argument that the Due Process Clause was only intended to protect against restraints of personal liberty, or physical restraints, is based on the history of its language and is not without a certain force. The argument is not harmed by the fact that a broad reading of the liberty term must mean that the state cannot enact legislation or proceed administratively in any way that restricts or classifies without also providing procedures. Such a reading would turn the Due Process Clause "into a virtual engine of destruction for

countless legislative judgments." *Weinberger v. Salfi*, 422 U.S. 749, 772 (1975). A middle ground, interpreting "liberty" to encompass interests protected by the Bill of Rights and any other interests which can be identified as "fundamental" under some unspecified scheme of values, is difficult to justify as a matter of theory. *See*, Ely, Foreward: On Discovering Fundamental Values, 92 Harv. L. Rev. 5 (1978).

While state intervention into the family to terminate parental relations may impinge upon a broadly conceived liberty interest of the parents, it does not involve that physical restraint which is the core value of the "liberty" term of the Due Process Clause. We do not here argue that termination does not require procedural safeguards under the Fourteenth Amendment. It would be hopeless to do so in the face of such a wide and deeply held current of precedent. But it should be emphasized that the parental interest at stake in these proceedings has already been compromised by removal or voluntary placement and attenuated by separation for at least one year. Even if the family unit had remained intact, the tiered approach to procedural protections implicit in *Mathews v. Eldridge*, 424 U.S. 319 (1976), and developed more expressly in subsequent cases, suggests that the extraordinary process due when the loss of physical liberty

may be a consequence does not necessarily follow when those concerns are not threatened.

Mathews v. Eldridge is largely a summation and crystalization of due process principles found in prior cases. It describes factors which are appropriately considered and balanced in the flexible calculus to set fair procedure in a particular case:

> "More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.*, at 334-35.

Assessing the private interests, the first case to follow *Eldridge* and apply its balancing test intimated that a constitutional hierarchy of values was relevant:

> "But even if the property interest claimed here is to be compared with the liberty interest at stake in [*Morrissey v. Brewer*, 408 U.S. 471 (1972)], we note that both the 'risk of an erroneous deprivation' and 'the degree of potential deprivation' differ in a qualitative sense and in degree from those in *Morrissey*." *Hortonville Dist. v. Hortonville Ed. Assn.*, 426 U.S. 482, 495 (1976).

Hortonville involved a questionable claim to a property interest. In *Morrissey* the interest, while qualified

by a parole status that need not have been granted by the state at all, was an interest in freedom from physical restraint in the form of incarceration; an interest which the Court identified as "includ[ing] many of the core values of unqualified liberty." *Morrissey v. Brewer,* 408 U.S., at 482.

Marked as they are by an overriding concern for flexibility and fairness, *see, Cafeteria Workers v. McElroy,* 367 U.S. 886, 895 (1961), the cases applying the Due Process Clause have few absolute rules. But the fact that "[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action," *Greenholtz v. Nebraska Penal Inmates, supra,* 442 U.S., at 18 (Powell, J., concurring in part and dissenting in part) is reflected in the language and the disposition of the cases

Without too great a strain, the due process cases treating liberty interests may be seen as presenting a pattern in which the closer the potential deprivation approaches the "core concern" of freedom from physical restraint, the more stringent are the requirements for those procedures designed to promote accuracy, at least where the freedom was unqualified in the first instance. The exceptions to this pattern have been based on particular historical traditions, a consideration not cataloged in *Eldridge.* In *Ingraham v.*

Wright, 430 U.S. 651 (1977), the Court declined to impose stringent procedural safeguards prior to school discipline, even though some physical restraints inhered, because of historical considerations:

> "If the common-law privilege to inflict reasonable corporal punishment in school were inapplicable, it is doubtful whether any procedure short of a trial in a criminal or juvenile court could satisfy the requirements of procedural due process for the imposition of such punishment." *Id.,* at 674 n. 44.

Similarly, in *Parham v. J.R.,* 442 U.S. 584 (1979), a central element of the argument for informal procedures when parents sought to commit a child to a mental institution was the tradition of broad parental authority over minors, although there the argument from tradition was coupled with the deference to professional expertise. The theme of tradition was sounded in a particularly vivid way by Justice Stewart, concurring. *Id.,* at 621-25 (Stewart, J., concurring).

The general principle that the restraint of an unqualified personal freedom triggers stringent procedures is most clearly evidenced in cases in which the claimant sought the procedural protections traditionally associated with criminal trials, like the right to counsel and a heightened burden of persuasion. *Addington v. Texas, supra,* the only case to impose a clear and convincing burden of persuasion on constitutional grounds, stresses that "civil commitment for any pur-

pose constitutes a significant deprivation of liberty that requires due process protection." *Id.*, 441 U.S., at 425. In *Vance v. Terrazas*, 444 U.S. 252 (1980), the Court declined to impose the clear and convincing standard in an expatriation proceeding precisely because physical liberty was not threatened:

> "We are unable to conclude that the specific evidentiary standard provided by Congress in §1481(c) is invalid under either the Citizenship Clause or the Due Process Clause of the Fifth Amendment. It is true that in criminal and involuntary commitment contexts we have held that the Due Process Clause imposes requirements of proof beyond a preponderance of the evidence. *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Addington v. Texas*, 441 U.S. 418 (1979). This Court has also stressed the importance of citizenship and evinced a decided preference for requiring clear and convincing evidence to prove expatriation. *Nishikawa v. United States, supra.* But expatriation proceedings are civil in nature and do not threaten a loss of liberty." *Id.*, at 266.

The Court did not hold that the clear and convincing standard was inappropriate because no liberty interest was affected. The standard was inappropriate because the *loss* of liberty was not threatened and the weight of tradition was against it.

Most recently, this Court expressly marked the distinction between the loss of physical liberty and other liberty interests in calibrating the procedures required in a termination case. In *Lassiter v. Depart-*

ment of Social Services, — U.S. ——, 68 L. Ed.2d. 640 (1981), Ms. Lassiter claimed that because she was indigent, the Due Process Clause entitled her to the assistance of appointed counsel. The right to counsel is, of course, a much more important (and less mechanical) right than the right sought here. Justice Stewart, writing for the majority, surveyed the cases in which appointed counsel had been required and observed that, "The pre-eminent generalization that emerges from this Court's precedents on an indigent's right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation." *Id.,* 68 L. Ed.2d., at 648. *Lassiter* noted that as a litigant's interest in personal liberty diminishes so does his right to appointed counsel and pointed to the fact that previous decisions had declined to extend the right to include prosecutions which did not result in the loss of personal liberty. The Court then converted the "pre-eminent generalization" into a presumption:

> "In sum, the Court's precedents speak with one voice about what 'fundamental fairness,' has meant when the Court has considered the right to appointed counsel; and we thus draw from them the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty. It is against this presumption that all the other elements in the due process decision must be measured."

Lassiter weighed the three *Eldridge* factors against the presumption that there is no right to appointed counsel in the absence of at least a potential deprivation of physical liberty to see if the presumption was rebutted. The Court did not "attempt to formulate a precise and detailed set of guidelines to be followed," *Id.*, at 652-53, in determining whether counsel must be appointed, but, in denying the necessity of appointed counsel for Ms. Lassiter, it assessed the facts.

In this case, as in *Lassiter*, the petitioner seeks to impose a procedural requirement traditionally associated with the potential loss of personal liberty in a proceeding which does not threaten such a loss. In theory, this case is distinguishable from *Lassiter* only in that the right to a more stringent burden of persuasion is more problematic than the right to appointed counsel. The appointment of counsel undoubtedly promotes fairness and accuracy in any litigation, albeit at great cost. It is not clear; indeed it is unlikely, that a more stringent burden of persuasion does so in termination proceedings.

The function of legal process is to minimize the risk of erroneous decisions. *Addington v. Texas, supra,* 441 U.S. at 425. It has been stated that the function of the standard of proof conflates with the function of process generally in that it is "to instruct the factfinder concerning the degree of confidence our society thinks

he should have in the correctness of factual conclusions for a particular type of adjudication." *In re Winship*, 397 U.S., 358, 370 (1970) (Harlan, J., concurring). But this cannot be entirely true, for the standard of proof only helps ensure the accuracy of a *particular* finding.[3] In the criminal trial context, the beyond a reasonable doubt standard protects against inaccurate convictions, not acquittals. In termination cases, a higher standard of proof would, presumably, protect against inaccurate terminations. But it would not protect against, and would in fact tend to promote, inaccurate failures to terminate. It should be obvious that the erroneous failure to terminate may have a substantial adverse impact on the interests of the child. An erroneous failure to terminate leaves the

[3] While that portion of Justice Harlan's concurring opinion quoted above is often cited in isolation, the context of his discussion makes it clear that Harlan was fully aware of the point we are making:

"A second proposition, which is really nothing more than a corollary of the first, is that the trier of fact will sometimes, despite his best efforts, be wrong in his factual conclusions. In a lawsuit between two parties, a factual error can make a difference in one of two ways. First, it can result in a judgment in favor of the plaintiff when the true facts warrant a judgment for the defendant. The analogue in a criminal case would be the conviction of an innocent man. On the other hand, an erroneous factual determination can result in a judgment for the defendant when the true facts justify a judgment in plaintiff's favor. The criminal analogue would be the acquittal of a guilty man.

The standard of proof influences the relative frequency of these two types of erroneous outcomes. If, for example, the standard of proof for a criminal trial were a preponderance of the evidence rather than proof beyond a reasonable doubt, there would be a smaller risk of factual errors that result in freeing guilty persons, but a far greater risk of factual errors that result in convicting the innocent. Because the standard of proof affects the comparative frequency of these two types of erroneous outcomes, the choice of the standard to be applied in a particular kind of litigation should, in a rational world, reflect an assessment of the comparative social disutility of each." *In re Winship, supra*, 397 U.S., at 370-71 (Harlan, J., concurring).

child in foster care or an institution; and it means that the child cannot acquire family stability by adoption. An erroneous failure to terminate may also cause the state, if it gives up on the process, to return the child to a potentially abusive or neglectful family. A failure to terminate *does not* return the child to the natural family.

In termination cases particularly, the more appropriate view of the function of the standard of proof is that it simply allocates the risk of error between the parties.

It is the distinctive feature of termination cases that there are three interested parties, not two. Therefore the usual interest balancing model for allocating risk between the state and a private party is inapplicable. That the child in termination cases has a very strong interest which may diverge from that of the parents is widely recognized. *See generally,* Goldstein, Freud, & Solnit, Beyond the Best Interests of the Child (1973); Areen, Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases, 63 Geo. L. J. 887 (1975); Foster & Freed, A Bill of Rights for Children, 6 Fam. L. Q. 343 (1972). The central policy of the New York system is to promote the best interests of the child, *Smith v. Organization of Foster Families, supra,* 431 U.S., at 823; F.C.A. §614(e); Soc. Serv. Law §384-

b(1)(a)(ii) (McKinney Supp. 1976-1977). That policy is expressed in the statutes and case law of many states. *See, e.g.,* Or. Rev. Stat. 419.474(2); *Wasson v. Wasson,* 92 N.M. 162, 584 P.2d. 713 (Ct. App. 1978); *State v. McMaster,* 259 Or. 291, 486 P.2d. 567 (1971); *In re B.E., B.L., & L.S.M.,* 287 N.W.2d. 91 (S.D. 1979); *In re S.J.,* 576 P.2d. 1280 (Utah 1978). In another context, this Court has stated:

> "The public's interest in this particular segment of the area of assistance to the unfortunate is protection and aid for the dependent child whose family requires such aid for that child. The focus is on the *child* and, further, it is on the child who is *dependent.* There is no more worthy object of the public's concern. The dependent child's needs are paramount, and only with hesitance would we relegate those needs, in the scale of comparative values, to a position secondary to what the mother claims as her rights." *Wyman v. James,* 400 U.S. 309, 318 (1971).

The child's interest, therefore, should at least not be relegated below that of the parents.

The fact that there is a triad of overlapping and conflicting interests involved in a termination proceeding would pose extreme difficulty for the proponents of the clear and convincing standard even in the absence of a strong and principled tradition reserving heightened burdens of persuasion for cases in which the loss of personal liberty may occur. If the purpose of the burden of proof is to allocate the risk of error and

the higher standard is imposed when "one party has at stake an interest of transcending value," *Speiser v. Randall,* 357 U.S. 513, 525-25 (1958), then the stricter standard cannot be imposed in termination cases; cases in which the competing interests are not only fundamentally ambiguous but often in equipoise. That there are three distinct interests involved in a termination proceeding is almost universally agreed. *See,* Areen, Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases, 63 Geo. L.J. 887, 890-94 (1975); Note, Involuntary Termination of Parental Rights: The Need for Clear and Convincing Evidence, 29 Am. U. L. Rev. 771, 776-77 (1980). This fact is made most clear in those states that adopt the view that the best interest of the child should control. It is also reflected by the fact that many states provide for appointed counsel for both the parents and the child. *See, e.g.,* F.C.A. §§ 1043(a); 241-49; Or. Rev. Stat. 419.498(2); *State ex rel Juv. Dept. v. Wade,* 19 Or. App. 314, 527 P.2d. 753 *rev. den.* (1975).

The tripartite relationship of interests to be considered in any termination proceeding led the Arizona Court of Appeals to assess the matter in the following, Harlanian, terms:

> "In a termination proceeding an error in factual determination can result in the termination of the parental relationship when such termination is not

> justified. On the other hand it can result in the failure to terminate when the relationship should be ended. The standard of proof is going to affect the relative frequency of those two erroneous outcomes. The standard of 'a preponderance of the evidence' would result in a greater risk that parental rights would be erroneously severed, but a smaller risk that a child, as a result of a factual error, would be forced to return to a hostile, if not dangerous, family situation or spend his childhood in a series of temporary foster homes. Comparing the social disutility of these two erroneous outcomes, we do not believe that one can make a *fundamental* value determination that the erroneous severance of parental rights, vis-a-vis the erroneous failure to sever, constitutionally requires a higher burden of proof." *Hernandez v. State ex rel Arizona Dept. of Econ. Sec., 23 Ariz. App. 32, 530 P.2d. 389, 393 (1975).*

The reasoning of the Arizona Court points directly at the primary reason for failing to impose the clear and convincing standard— the fundamental recognition that weighting the factfinding process in favor of the parents may harm the child by ensuring that he remains in foster care, or in an institution, without the possibility of adoption. There is also the danger, of course, that the state will respond to the inability to prove permanent neglect by clear and convincing evidence by returning the child to an abusive natural family. But in the ordinary case the state will most likely maintain the *status quo ante,* a distinctly unhappy solution from an adoptable child's point of view.

The statement in *Hernandez* rests primarily on the structural fact that there are three potentially conflicting sets of interests. An analysis of those interests, or even a mere cataloguing of those interests, demonstrates that no one party can claim a transcendant value at stake in these very murky and very human circumstances. All of the parties in a termination proceeding have an interest in maintaining, or establishing, in the absence of a communal child raising policy, a viable natural family unit; and all of the parties have an interest in avoiding, whether they express it or not, a family environment that is abusive or neglectful. But between these extremes, and sometimes even at the extremes, the interests will diverge and equivocate.

The child has an interest in receiving the care and training necessary to develop into a well adjusted adult, especially in circumstances where psychological literature shows how crucial as well as how short the effective time is for intervention. *See,* Wald, State Intervention on Behalf of Neglected Children, *supra.* The child also has an interest in the integrity of the natural family. But perhaps the child's most important interest is in avoiding an extended series of foster care placements or institutionalizations and in avoiding placement in the natural family when he is likely to be abused or neglected. The parents have an inter-

est in the maintenance of the family unit, which may include the right to the care, custody, and control of the child; the right to discipline the child and the right to control the child's religious and moral education. The state has *parens patriae* interests and police power interests in both the welfare of the child and the growth of a healthy and stable emerging population. These basic interests, and they are by no means exhaustively listed, will merge and converge, strengthen and weaken, as the factual settings vary.

To the practical fact that there are no unambiguous transcendent interests at stake which must be protected by a stricter standard of proof must be added the additional practical fact that the evidence in termination cases will ordinarily be framed in terms of probabilities. The point of the termination inquiry is usually, as in New York, predictive; do the best interests of the child warrant termination? The evidence necessary to establish a given conclusion will ordinarily be in the form of opinion testimony by psychiatrists, social workers, and other experts. The practical evidentiary difficulties which weighed heavily against imposing a beyond reasonable doubt standard of proof in *Addington*[4] should also weigh against the imposi-

[4]"Finally, the initial inquiry in a civil commitment proceeding is very different from the central issue in either a delinquency proceeding or a criminal prosecution. In the latter cases the basic issue is a straightforward factual question — did the accused commit the act alleged? There may be

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tion of the clear and convincing standard for terminations.

Though they have seldom been afforded what we might consider appropriate influence in Due Process cases, principles of federalism should also weigh against invalidating state statutes that allow termination of parental rights and duties by a preponderance of the evidence. This Court has, on occasion, expressed a deference to state legislation involving family interests.

In *United States v. Yazell,* 382 U.S. 341 (1966) the United States attempted to avoid the effect of a Texas coverture statute. The Court declined to override state law in part because of a sensitivity to federal-state relations where family laws were concerned.

> "We decide only that this Court, in the absence of specific congressional action, should not decree in this situation that implementation of federal interests require overriding the particular state rule involved here. Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements. They should be overridden by the federal courts only where clear and substan-

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factual issues to resolve in a commitment proceeding, but the factual aspects represent only the beginning of the inquiry. Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists. Given the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as to whether a state could prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous." *Addington v. Texas, supra,* 441 U.S. at 429.

> tial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied." *Id.*, at 352.

This "traditional" solicitude for state legislative enactments in the field of family law is buttressed by an even older and more secure tradition. Seldom cited in Due Process cases, the presumption of the constitutionality of state laws, "which is the postulate of constitutional adjudication," *People of State of New York v. O'Neill,* 359 U.S. 1 (1959), should be allowed its full force in cases like this, where the statutes are procedurally involved and interwoven, the private interests obscure, and the constitutional claim doubtful at best. *See, Parham v. Hughes,* 441 U.S. 347, 351-52 (1979); *People of State of New York v. O'Neill, supra; Davis v. Dept. of Labor and Industries of Wash.,* 317 U.S. 249 (1943).

An appreciation for the importance of federal-state relations recently led this court to remark, with respect to procedurs, that, "The essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold." *Addington v. Texas, supra,* 441 U.S., at 431. To the extent the argument for imposing a clear and convincing standard has not already been interred by the considerations sketched above, this "essence of federalism" should be decisive.

The procedures established by the states for the termination of parental custody are multifaceted, intertwined, and ordinarily strung over a lengthy period of time in any given case. Those procedures may require very stringent safeguards at some points and relaxed safeguards at others. The procedural scheme might, for instance, as in New York, require appointment of counsel for all private parties and not allow immediate termination to follow a finding of dependency for abuse or neglect. These strict procedural impediments to termination might justify more elusive standards for the ultimate inquiry. Or very narrowly drawn standards for termination may justify immediate action terminating parental custody when those standards have been violated. Again, a procedure which, like New York's, mandates extensive and long lasting efforts by social agencies to rehabilitate the natural family and *de novo* review may justify a relaxation of some other element of the procedural corpus. So long as the procedural scheme is not manifestly unfair when considered as a whole, and this one plainly is not, the states should be allowed to function freely as laboratories for social experiment. *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting).[5]

[5] See also, Missouri, Kansas, & Texas Railway Co. of Texas v. May, 194 U.S. 267, 270 (1904) (per Holmes, J.):

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It cannot be assumed that the states are insensitive to parental interests in termination proceedings. Any fair analysis of New York's procedural scheme, or that of the State of Oregon, for that matter, refutes such an assumption. The statutes are not drawn to minimal constitutional limits. They evidence clearly an attempt to accomodate the parents and rehabilitate the family. In this context, to isolate and declare that a particular standard of proof is constitutionally mandated procedure is shortsighted and unnecessarily rigid. It is more a matter of secreting substantive law in the interstices of procedure than imposing procedural safeguards. If the burden of persuasion is to be weighted heavily in favor of the parents, the state's obligation to the child must find new methods of expression. Those expressions may, in an effort to regain an essential and delicate balance, end in a procedural framework that is awkward for all parties.

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"Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." Quoted in F. Frankfurter, The Public and Its Government 76 (1930).

CONCLUSION

For the reasons stated above, the decision of the Supreme Court of the State of New York should be affirmed.

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